IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 18TH JUNE 2007 / 28TH JYAISHTA 1929

MFA.No. 11 of 2007(B)

EL. OP.261/2005 of II ADDL.DISTRICT COURT,ERNAKULAM

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APPELLANT: PETITIONER IN ELECTION OP

P.A.NIAMATHULLA, AGED 41 YEARS,
S/O.LATE P.M.ABDUL KAREEM,
RESIDING AT KANNATTUPADAVIL HOUSE,
U.C.COLLEGE P.O., ALUVA WEST VILLAGE,
PIN CODE NO.683 102.

BY ADV. P.A.NIAMATHULLA (PARTY IN PERSON)

RESPONDENTS: RESPONDENT IN ELECTION OP

V.A.SHABEER, AGED ABOUT 30 YEARS,
S/O.ABOOBACKER, RESIDING AT VAZHELIPARAMBIL
HOUSE, U.C.COLLEGE P.O., ALUVA WEST VILLAGE,
PINCODE NO. 683 102.

BY ADV. SRI.A.JAYASANKAR
SRI.MANU GOVIND

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 18/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

M.F.A. (Panchayat Raj Act) No. 11 of 2007

Dated this the 18th June, 2007.

J U D G M E N T

An unsuccessful candidate, whose petition for declaring the election of the respondent as void, has filed this appeal. The court below had dismissed his Election Petition.

2. The appellant and respondent were candidates who contested from Ward No.2 of Alangad Block Panchayat for the election to Panchayat held in September, 2005. He is a voter of Kadoopadam Constituency of Karumalloor Village Panchayat, which is a component of No.2 Veliyathunadu Constituency of Alangad Block Panchayat. Election was held on 24.9.2005, and respondent was declared elected. Petitioner filed Election Petition before the designated Court at Ernakulam, to declare the election of respondent as void mainly on two grounds. Firstly, respondent filed the nomination paper before a person who had no authority to receive the same. Secondly, the respondent did not make or subscribe the oath or affirmation before the Returning Officer or any other person authorised by the State

Election Commission and hence not qualified for chosen to fill a seat in Panchayat, under Section 29(e) of the Kerala Panchayat Raj Act, 1994, (for short 'the Act').

3. Respondent filed a counter contending that the Election Petition was not maintainable. It was contented that the Election Petition was defective and it was filed after the expiry of the period of limitation. It was contented that the respondent signed the oath or affirmation according to the form set out for the purpose in the first schedule before the Returning Officer, and, as such, he was fully qualified to contest for the election. It was also contented that he filed the nomination before the Assistant Returning Officer, who was fully competent to verify the nomination papers, and receive the same. Hence, there was absolutely no ground to declare the election as void.

4. Appellants examined PW.1 to 5, and marked 11 documents, Ext.X1 to X11. Respondent did not adduce any evidence. The learned Second Additional District Judge, Ernakulam, after trial, found that the oath or affirmation of the respondent was made before the Assistant Returning Officer, and even if the Assistant Returning Officer has no authority, it is a fit case in which the Principle of De

facto doctrine is to be applied. It was also held that PW.5, who received the nomination paper, was holding the charge of Block Development Officer and Assistant Returning Officer, and as such, was competent to receive the same. The Election Petition was dismissed. Challenging that Order, this appeal is filed.

5. The two grounds raised for consideration in this appeal are as follows:-

> (1) Whether the allegation that the respondent had not made and subscribed the oath or affirmation before the Returning Officer or any other person authorised by the State Election Commission, and thereby not qualified for chosen to fill a seat in a Panchayat.
>
> (2) whether the respondent had delivered the nomination paper to the Returning Officer or to the Assistant Returning Officer authorised by the Returning Officer, who had authority to receive the same.

6. There are few admitted or proved facts. The State Election Commission issued notification declaring Election to the local bodies to be held on 24.9.2005. As per Ext.X1 notification, PW.2, Smt.Sairabhanu, the Deputy Director of Fisheries (Zonal), was appointed was the Returning Officer of Ward No.2 of Alangad Block

Panchayat by designation. The Returning officers of five Grama Panchayats which formed part of Ward No.2 of Alangad Block Panchayat were named as Assistant Returning Officers of Ward No.2 of Alangad Block Panchayat to assist the Returning Officer. The Secretary of each Block Panchayat were also designated as the Assistant Returning Officer to assist the Returning Officers. Smt.T.C.Mary, the Block Development Officer, Alangad, who was designated as Assistant Returning Officer, retired from service, on the after noon of 31.8.2005. The District Collector, Ernakulam, relieved her of the duties as Block Development Officer on the after noon of 31.8.2005, and directed PW.5, O.G.Venugopal, Extension Officer (IRD), Block Development Office, Alangad, a non-gazetted officer, to hold full additional charge of Block Development Officer, Alangad, till further orders. Ext.X9 is the order passed by the District Collector, Ernakulam. PW.4, Smt.M.K.Padmavathy, succeeded T.C.Mary as Block Development Officer. She took charge on the Fore noon of 6.9.2005. So, from the Fore noon of 1.9.2005 till the after noon of 5.9.2005, PW.5, O.G.Venugopal, was holding full additional charge of Block Development Officer, Alangad. The respondent and some other candidates delivered nomination papers to PW.5 who was holding the full additional charge of Block Development Officer. The respondent

made and subscribed the oath before PW.5, O.G.Venugopal. The appellant delivered the nomination to PW.4, the Block Development Officer on 6.9.2005. He made and subscribed oath also before PW.4, the Block Development Officer.

7. The core question arising for consideration in this appeal is whether PW.5, O.G.Venugopal, who was not a gazetted officer and who was put in full additional charge of Block Development Officer, by the District Collector, under Ext.X9 order is an Assistant Returning Officer, and whether he is competent to attest the oath or affirmation of a candidate, as enjoined under Section 29(e) of the Act.

8. Section 29 of the Act deals with the qualification for membership. Section 30 to 35 of the Act deals with the disqualification of candidates to be chosen to fill a seat in the Panchayat. A harmonious construction of these Sections would clearly show that a person must not only to be disqualified, but he must be qualified, as provided under Section 29 of the Act. Section 29 of the Act reads as follows:-

"29. Qualifications for membership of a Panchayat.-- A person shall not be qualified for chosen to fill a seat in a Panchayat at any level unless, -

(a) his name appears in the electoral roll of any constituency in the Panchayat;

(b) he has completed his twenty-first year of age (on the date of filing of nomination);

(c) in the case of a seat reserved for the Scheduled Castes or for the Scheduled Tribes, he is a member of any of those castes or of those tribes as the case may be;

(Provided that even if a candidate has omitted any word or words inadvertently when he makes and subscribes signature in such oath or affirmation and in the case he has been subsequently elected as member and assumed office on oath or affirmation made in the Second Schedule he shall not be considered as disqualified for the mistake happened earlier)

(d) in the case of a seat reserved for woken, such person is a woman;

(e) he makes and subscribes before the returning officer or any other person authorised by the State Election Commission an oath or affirmation according to the form set out for the purpose in the first schedule; (emphasis supplied)

(f) he has not been disqualified under any other provisions of this Act."

9. Section 29(e) of the Act provides that a candidate must make or subscribe an oath or affirmation before the Returning Officer or any other person authorised by the State Election Commission, as per the form set out for the purpose, in the First Schedule. Admittedly, PW.5 was not a Returning Officer or an Assistant Returning Officer designated by the Election Commissioner. His authority to receive the nomination paper and attest the oath or affirmation was traced to Ext.X9 order passed by the District Collector. Ext.X9 is the proceedings of the District Collector, Ernakulam, which reads as follows:-

> "Smt.P.C .Mary, Block Development Officer Alangad retire from service on the A.N. of 31.8.2005. She is relieved of her duties as Block Development Officer on the A.N. of 31.8.2005. Sri.O.G.Venugopal, Extension Officer (IRD) will hold full additional charge of the BDO Alangad till further orders."

10. Smt.Mary was appointed as the Assistant Returning Officer by the Election Commissioner, and not by the District Collector. She was the Block Development Officer also. PW.5 was not the Block Development Officer. He was only discharging the functions of Block Development Officer as a stop gap arrangement, by virtue of an order

of District Collector. The State Election Commissioner had not passed any order designating PW.5 as the Assistant Returning Officer. What exactly is the effect of the arrangement made by the District Collector? Can that arrangement cloth PW.5 with the powers of Assistant Returning Officer?

11. Section 39 of the Act provides that the functions of State Election Commissioner may be performed by the Secretary to the State Election Commission, subjected to certain conditions. Section 40 of the Act deals with the general duties of the District Election Officer, which reads as follows:-

> **"40. General duties of district election officers:-** Subject to the superintendence, direction and control of the State Election Commission, the district election officer, shall co-ordinate and supervise all work, in the district, in connection with the conduct of all elections to the Panchayats in the district.

12. According to the respondent, District Collector was designated as District Election Officer. A reading of Section 40 makes it clear that the duties of the District Collector as a District Election Officer is confined to co-ordinate and supervise all work in a

District, in connection with the Election. He is not clothed with any of the powers of the Election Commissioner. Election Commissioner cannot delegate any of his powers to a District Election Officer.

13. Section 41 of the Act provides for appointment of the Returning Officer. It reads as follows:-

> "**41. Returning Officers:**- For every Panchayat, for every election to fill a seat or seats in the Panchayat, the State Election Commission shall, in consultation with the Government, designate or nominate (one or more returning officer who shall be an officer of the Government or of a local self Government institutions:
>
> Provided that nothing in this section shall prevent the State Election Commission from designating or nominating the same person to be the returning officer for more than one Panchayats lying adjacent."

14. Section 42 of the Act deals with the appointment of Assistant Returning Officers, which reads as follows:-

> **"42. Assistant Returning Officers:-** (1) The State Election Commission may appoint one or more persons as assistant returning officers to assist any returning officer in the performance of his functions;

> (2) Every assistant returning officer shall, subject to the control of the returning officer, be competent to perform all or any of the functions of the returning officer;
>
> Provided that no assistant returning officer shall perform any of the functions of the returning officer which relates to the scrutiny of nominations unless the returning officer is unavoidably prevented from performing the said function."

15. Section 43 of the Act provides that the word Returning Officer will include the Assistant Returning Officers performing the functions of a Returning Officer, which reads as follows:-

> **43. Returning Officer to include assistant returning officers performing the functions of the returning officer:-** References in this Act to the returning officer shall, unless the context otherwise requires, be deemed to include as assistant returning officer performing any function which he is authorised to perform under sub-section (2) of Section 42."

16. A combined reading of Sections 42 and 43 of the Act, will make it clear that a Returning Officer can authorise to the Assistant Returning Officer to perform all or any of the functions of the Returning Officer, except the function of the Returning Officer, which relates to the scrutiny of nominations. There is no material before

this Court to hold that PW.2, who was the Returning Officer, gave any authorisation to PW.5 to discharge the function of Returning Officer. The only evidence relied on by the respondent is Ext.X8, a notification issued by the State Election Commissioner appointing the Secretary of each block Panchayat as the Assistant Returning Officer to assist the Returning Officers. There was dispute as to whether Ext.X8 had actually been communicated to the Secretary of Alangad Block Panchayat. The appellant has got a case that Ext.X8 notification itself was issued on 29.8.2005 by the State Election Commissioner, and that was forwarded to the Returning Officers by the District Collector on 30.8.2005, and it was never communicated to the Secretary. According to the appellant, initially Ext.X8 was produced before court without any endorsement and subsequently an entry was made on the reverse of the copy of Ext.X8 to create evidence. Ext.X8 order reads as follows:-

> "In exercise of the powers conferred under sub section (1) of the Section 42 of the Kerala Panchayat Raj Act, 1994 (13 of 1994) the State Election Commission hereby appoints the Secretary of each block panchayat as the Assistant Returning Officer to assist the Returning Officers notified in Notification No.192/2005/SEC dated 18th August 2005 and 191/2005/SEC dated, 18.8.2005 of the State Election Commission. "

17. The disputed entry reads as follows:-

"Copy forwarded to Secretary Alangad Block Panchayat for necessary action.

Sd/-
Returning Officer
Alangad Block Panchayat"

It only shows that the Secretary of each Block Panchayat was appointed as the Assistant Returning Officers to assist the Returning Officers. By no stretch or imagination, Ext.X8(a) can be considered as an authorisation given to the Assistant Returning Officer by the Returning Officer, under Section 42(2) of the Act. Ext.X8(a) does not authorise any body to act as a Returning Officer. The authorisation contemplated under Section 42(2) of the Act must be in writing and explicit. No evidence is available in this case to show that the Assistant Returning Officer of Ward No.2 of Alangad Block Panchayat was authorised by the Returning Officer to discharge the functions of the Returning Officer. So, even if the contention of the respondent that PW.5 was the Secretary of Alangad Block Panchayat and the Assistant Returning Officer is accepted, PW.5 was not competent to discharge the functions of Returning Officer.

18. Section 29(e) of the Act provides that the oath or affirmation shall be subscribed before the Returning Officer or any other person authorised by the State Election Commissioner. Ext.X2 (a) notification shows that in addition to the Returning Officer, the Election Commissioner had designated the following persons also,

(1) All gazetted officers in the State Government Service

(2) The Superintendent (Jails), in the case of persons detained in prisons.

(3) The Commandant of a Preventive Detention Camp, if the candidate is declared under the provisions of Preventive Detention.

(4) The Medical Superintendent or Medical Officer, in case the candidate is undergoing treatment in a hospital or unable to move about due to illness.

(5) In case the candidate who is outside India, the officers attached to the Consular General's office.

Admittedly, PW.5, will not come within any of these five categories mentioned in the notification. So, unless PW.5 comes within the definition of the Returning Officer, the oath or affirmation subscribed before him by the respondent cannot be treated as one in accordance with the provisions of Section 29(e) of the Act.

19. In **Hariramsingh v. Kamtaprasad Sharma** (AIR 1966 Madhya Pradesh 255), a question arose as to whether a Deputy Collector who was designated as Additional Collector under Section 17 (1) of the M.P.Land Revenue Code (20 of 1959) is a Collector within the meaning of the Representation of People Act. A Division Bench of the Madhya Pradesh High Court, held that unless a Deputy Collector has been by a general or special order directed to perform the duties of the Collector under the Representation of People Act, he is not authorised to act as a Returning Officer. In this case, PW.5 was put in additional charge of the Block Development Officer, Alangad, by the District Collector. As I have already noted, District Collector is not competent to confer any of the powers of Returning Officer or Assistant Returning Officer to PW.5. In fact, the District Collector did not pass any order designating PW.5 as the Assistant Returning Officer also. So, merely because PW.5 was directed to hold full additional charge of Block Development Officer on a stop gap arrangement, that will not cloth him with the powers of the Returning Officer or Assistant Returning Officer. No order was issued by the State Election Commissioner authorising PW.5 to discharge the functions of an

Assistant Returning Officer. Hence, PW.5 was not a Returning Officer or Assistant Returning Officer, within the meaning of Section 29(e) of the Act.

20. The next question that arise for consideration is whether the act of the respondent subscribing the oath or affirmation before PW.5 can be saved by applying the principle of De facto doctrine. The learned District Judge relying on a decision reported in **Raghavan Nair v. Joint Registrar** (1993 (1) KLT 725) took a view that the action on PW.5 can be upheld. In Raghavan's case (supra) a Returning Officer was appointed by a person who in fact had no authority to make such an appointment. On the strength of that order, the Returning Officer received nominations. The result of the Election was challenged on the ground that the Returning Officer was incompetent to conduct an Election. Even at that stage, appointment of the Returning Officer was not challenged. A Division Bench of this Court, applied the principle of De facto Doctrine, and held that the action of the Returning Officer is to be protected. In this case, there is no order by any body conferring PW.5 the powers of either the Returning Officer or Assistant Returning Officer. It is to be noted that there were five other Assistant Returning Officers. The Returning

Officer could have very well authorised in writing any one of them to perform the functions of the Returning Officer, until a new Returning Officer takes charge. But that was not been done in this case.

21. The learned District Judge also relied on a decision reported in **Gokaraju Rangaraju v. State of Andhra Pradesh** (AIR 1981 Sessions Court, 1473). In the said case, a particular person was appointed as Sessions Judge, and he discharged the functions of a Sessions Judge. Subsequently, the appointment was challenged on the ground that the appointment was in violation of Article 233 of the Constitution of India. The question arose as to whether the defective appointments can be challenged in collateral proceedings. The Apex Court, relying on P.S Menon v. State of Kerala (AIR 1970 Ker 165), and various other decisions held that the principle of de facto doctrine is well settled, the act of the officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons, and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de jure. There is absolutely no orders passed by any competent or

incompetent officer, conferring PW.5 with the powers of the Assistant Returning Officer. So, the principle of De facto Doctrine cannot be be applied to the facts of this case.

22. In **Sheikh Abdul Rehman v. Jagat Ram Aryan** (AIR 1969 SC 1111), the Apex Court held that failure to subscribe oath or affirmation before the authorised officer is fatal, and the nomination paper is liable to be rejected. It was held as follows:-

> " The failure of a person prior to filing the nomination paper to make or subscribe oath or affirmation before the authorised officer as required under S.51(a) disqualifies him to be chosen to fill the seat in the Legislature under S.51 (a). "

The provisions contained in Section 29(e) of the Act is also similar to Section 51 of the J & K Representation of People Act, which is para materia to Section 36(2)(a) of the Representation of People Act.

23. It is a trite law that the power to contest an election is not a Common Law Right. In N.P.Ponnuswami v. Returning Officer, Namakkal (AIR 1952 Sessions Court, 64), the Apex Court held

that the right to oath or stand as a candidate and contest election is not a civil right, and it is a creature of statute, and must be subjected to the statutory limitations.

24. In **Jyothi Basu v. Debi Ghosal** (AIR 1982 SC 983), the Apex Court has held as follows:-

> "Right to elect, to be elected or to dispute election are neither fundamental rights nor common law rights but are confined to the provisions of the Representation of the People Act and Rules made thereunder. Being statutory rights the remedies are limited to those provided by relevant statutory provisions."

25. In **Subhash Desai v. Sharad J.Rao and Others** (1994 Supp (2) SCC 446), a three Judge Bench of the Supreme Court held that the right to contest an election is a special right created by a statute and can be exercised on the conditions laid down by the said statute. So, the court below went wrong in applying the principle of de facto doctrine in this case.

26. There is yet another aspect. In an unreported decision in **Muralidharan v. Kerala State Election Commission and Others**, (O.P.Nos.29473 of 2000 & 31223 of 2000 decided on

4.2.2003) a Division Bench of this Court had occasion to consider the effect of oath or affirmation made by a candidate not in accordance with the prescribed form. In that case, the allegation was that the oath or affirmation accompanied the nomination papers had subscribed to an oath which do not conform to the Second Schedule of the Kerala Municipality Act, 1994, and under the Panchayat Raj Act. It was alleged that the oath or affirmation was not made in the form prescribed in the First Schedule of the Panchayat Raj Act. Originally, the form prescribed under the Conduct of Election Rules framed under the Panchayat Raj Act was in form No.1. Subsequently, the form was amended in the year 1999 and an addition was made as, 'will uphold the sovereignty and integrity of India'. In the above cases, due to an omission on the part of the Returning Officers, the candidates were supplied with the unamended form instead of amended form. The Election Commissioner has filed a counter affidavit contending that, that was a bona fide omission and while printing the forms, the amendment made in the year 1999 was not given effect to. As a result, the unamended forms were supplied to the candidates, and they subscribed oath in the old form. It was further contented that there was no omission on the part of the candidates, but mistake, if any, was committed by the office of the Election Commission, and for

such a fault, the candidates shall not be penalised. The Court considered the question and held as follows:-

> "9. The conditions of eligibility to contest the election are laid down in S.85. It inter alia provides that "no person shall be qualified for election as a Councilor or a Municipality unless he possesses the "following qualifications." In particular, it has been provided in clause (f) that he must "make and subscribe before the Returning Officer or any other person authorised by the State Election Commission an oath or affirmation in the form set out in the Second Schedule." His name must appear in the electoral roll. He should have completed 21 years of age. He should not be disqualified under any other provisions of the Act."

27. It was further held as follows:-

> "15. On a plain examination of the language of the provision in S.85, it is clear that it lays down the basic minimum conditions of eligibility. A person who does not fulfil any of the requirements cannot contest the election. The candidate who does not subscribe to the oath in the prescribed form is not qualified to contest. The bar is absolute. It does not permit any exception. It does not allow for any relaxation. It does not provide for any departure."

28. It was also noted that a person who does not fulfil the conditions of eligibility cannot contest the election. This Court relied on the principle in **Harjith Singh v. Umrao Singh** (AIR 1980 SC 701), in which, it was held that the requirement for making and subscribing the oath or affirmation is clearly mandatory. This Court answered the contention that the lapse was committed by the Election Commissioner, as follows:-

> "20. ..... Though, it is clear that the lapse on the part of the Election Commission is serious, yet, under the statute, the candidate has the responsibility. He has to ensure that the nomination paper is filled up properly and that the oath, in the prescribed form as laid down in the Schedule, is made and subscribed to. He alone suffers for the default. No one can take umbrage behind the fault of the authority and plead that the mistake should be condoned or overlooked."

So, the only inescapable conclusion possible from the proved facts in this case is that the oath or affirmation subscribed by the respondent was not before the Returning officer or an Assistant Returning Officer authorised by the Returning Officer. Hence, he was not qualified for being chosen to fill a seat in the Panchayat, at any level.

29. The learned counsel appearing for the respondent has raised a contention that the appellant has never raised such an objection, at the time of scrutiny, and, as such, he shall not be allowed to raise such a contention. Mere fact that the appellant failed to raise such an objection before the Returning Officer, will not debar him from filing an Election Petition challenging the result of the Election. So, that contention is also without any merit.

30. It is argued that the Election Petition was filed after the expiry of the period of limitation. Such an argument was raised before the learned District Judge, who considered the same in detail, and held that that contention is without any merit. I have gone through the order passed by the learned District Judge. I do not find any reason to take a view different from the one taken by the learned District Judge. The Election Petition is filed within the period of limitation. It is also argued that the Election Petition filed does not satisfy the requirements of Section 91 of the Act, and, as such, it is liable to be dismissed in limine. Though such a contention was raised, it was not shown as to how the Election Petition was defective. The Election was challenged mainly on two grounds, and those grounds

are enumerated in the Election Petition, and all relevant statutory requirements complied with. So, there is no defect in the petition filed by the appellant.

31. I have already found that PW.5 was neither a Returning Officer nor an Assistant Returning Officer who was authorised by the Returning Officer to accept nominations. PW.5 had no authority to receive the nomination paper. The respondent delivered the nomination paper to PW.5. So, there was no proper presentation of nomination, as enjoined under Section 52 of the Act. Hence, I have no other option, but to declare the election of the respondent as void.

32. There is also a prayer to declare the appellant as an elected candidate. Considering the materials on record, I do not find any reason to grant such a relief. So, that relief is refused.

33. In the result, the M.F.A. is allowed in part. It is declared that the Election of the respondent from Ward No.2 of Alangad Block Panchayat is void.

Registry will forward a copy of the judgment to the Election Commissioner and the President of the Panchayat concerned for taking necessary action.

K.PADMANABHAN NAIR,
JUDGE

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